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NO. 84-489

IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1984

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF CORRECTION

Petitioner

v.

UNITED STATES MARSHALS SERVICE, et al.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For The Third Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. In our main brief we outline the authority and policies which support the conclusion that the All Writs Act (28 U.S.C. §1651) serves as the source for the District Court's order directing the Marshal to take custody of state prisoners and produce them in federal court. The Marshal's central thesis in resisting our submission, stripped of its substantial verbiage, is the argument that the All Writs Act may not supply authority for a court order "[w]here a legal rule or doctrine specifically addresses the particular question under consideration." Resp. Br. 21. In the Marshal's view, because the habeas corpus provisions specifically authorize the issuance of writs for the purpose of securing the presence of prisoners to testify (28 U.S.C. §2241(c)(5)) and also

require that those writs be addressed to the custodian (28 U.S.C. §2243), the All Writs Act does not provide authority for an order requiring anyone other than the present custodian to produce the prisoner. The Marshal's narrow view comports neither with the broad terms of the All Writs Act nor with the flexibility this Court has accorded the statute.

The Court has characterized the All Writs Act as "a legislatively approved source of procedural instruments designed to achieve the 'rational ends of the law.'" Price v. Johnston, 334 U.S. 266, 282 (1948), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942). The All Writs Act provides the means for softening the rigidity with which ancient practice has endowed the writ of habeas corpus; "[j]ustice may on

occasion require the use of a variation or a modification of an established writ." Price v. Johnston, supra, 334 U.S., at 283-284. The modification of the traditional habeas corpus writ crafted by the District Court in this case is consistent with the Court's practice of permitting sensible, appropriately confined variations or modifications of existing writs when justice so requires.

a. The Marshal's reliance on the historical practices governing habeas corpus and the provisions of 28 U.S.C. §2243 which carry forward those practices runs afoul of the Court's admonition that "dry formalism should not sterilize procedural resources which Congress has made available to the federal courts." Adams v. United States ex rel. McCann, 317 U.S., at 274. To be sure, the fact

that there exists a specific procedural instrument to secure prisoners for testimony in court is not irrelevant - but that point is the beginning, not the end, of the initial inquiry whether the magistrate's order was "necessary or appropriate" in aid of his jurisdiction. 28 U.S.C. §1651(a). Congress has recognized, by its endorsement of the All Writs Act from 1789 through today, that, prescient as that lawmaking body may be, it never has been able to anticipate all of the circumstances which may arise in the courts. The general grant of authority contained in the All Writs Act permits the federal courts to be creative in designing new procedural instruments necessary to insure that justice is done. The achievement of this purpose may require the courts to act creatively in an area partially covered by other

specific procedural tools or in a sphere untouched by Congressional action. The appropriate question is not whether Congress ever has legislated in the field, but whether the action serves the interests of justice. Adams v. United States ex rel. McCann, supra, 317 U.S., at 274.

In order to analyze the nature and consequences of the writ issued by the magistrate to the Marshal, it is necessary to examine the setting in which the writ was issued. Here, the case on the merits is one brought pursuant to the Civil Rights Act, 42 U.S.C. §1983, a statute enacted by Congress as a vehicle for remedying violations of constitutional rights committed under color of state law. The federal courts are the primary forum designated by Congress for the vindication of these rights.

In order for the federal courts to exercise their jurisdiction in civil rights actions, it is often necessary for the parties to appear in court in person. While writs of habeas corpus ad testificandum certainly were a part of the common law, civil rights litigation of the nature and scope generated by current federal statutes just as certainly was unknown. The demands imposed on custodians by the number of civil rights actions is a novel development and this burden is relevant to a trial court's initial determination of whether to issue a writ for the production of inmates. In deciding whether or not to issue a writ ordering the production of an inmate-plaintiff or inmate-witness, the trial court often is deciding whether or not it will exercise meaningful jurisdiction in these cases,

because without live testimony from the plaintiff or his witness, the case often will be dismissed. It is at this point, when the trial court is balancing the interests of the custodian versus the interests of a litigant whose remedy has been provided by Congress, that the court's ability to exercise its jurisdiction may be defeated or, at least, impaired because the scales tip against the inmate-plaintiff. It is then that the authority of the federal courts to issue writs in "aid of their respective jurisdictions" may be utilized to effectuate the remedial goals of the Civil Rights Act.

The magistrate recognized that the transportation responsibilities imposed upon the petitioner in this case were substantial. The Marshal concedes that the burden on the custodian is a factor

to be weighed in deciding whether to order production of prisoners. Resp. Br. 12. Faced with the difficult choice of imposing an unusually heavy burden on the custodian or, perhaps, weakening the strength of the record by denying the inmate-plaintiff's requests for witnesses, the magistrate sought another procedural tool to break this impasse. Familiar as he was with the duties of the Marshal in the district, the magistrate concluded that the solution which best served the interests of justice was to call upon the Marshal for assistance. The magistrate concluded, and the Marshal does not dispute, that this particular order imposed no measurable burden on the Marshal who routinely transports prisoners between the federal courthouse and the local detention center. Under these circumstances, it is clear that the

order under review was "necessary or appropriate" under the All Writs Act. Only adherence to "dry formalism" supports the contrary position taken by the Marshal.[1]

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[1]The Court has rejected the notion, advanced by the Marshal (Resp. Br. 18), that there must be "specific legislative authorization" before a district court may enlist the aid of third parties. United States v. New York Telephone Co., 434 U.S. 159, 172 (1977). The federal courts have been invested by Congress with the authority to compel the assistance of third parties when, even though not strictly "necessary," the aid of strangers to the litigation nevertheless is "appropriate" in permitting the court "to achieve the ends of justice entrusted to it." Adams v. United States ex rel. McCann, supra, 317 U.S. at 273. There can be no question, and the Marshal does not dispute, that the order under review here is a perfectly appropriate, rational solution to the burden faced by state custodians who are required to transport for great distances many prisoners whose presence is required in court.

b. Similar considerations support the conclusion that the order under review is, as required by the All Writs Act, "agreeable to the usages and principles of law." 28 U.S.C. §1651. Certainly, transfer of custody violates no positive Congressional command or common law rule. Rather, the order modifies traditional procedure to account for modern developments. The essential principle underlying the writ of habeas corpus ad testificandum is that of affording the courts an efficacious procedure for securing the testimony of a prisoner. This principle hardly is subverted by a modification of the writ directing transfer of the prisoner from the custodian to a substitute custodian.

Moreover, whatever standards exist to govern and define the role of the Marshal are consistent with the duties imposed by

the order here. Marshals are assigned to various judicial districts to, among other things, attend court and transport prisoners. See 28 U.S.C. §§567, 569. The duties imposed upon the Marshal in this case are consistent with the Marshal's normal duties. At least in the absence of a showing that a substantial burden has been imposed on the Marshal, a transfer of custody order like the one under review here is agreeable to the governing principles and usages of law.[2]

2. Without formally invoking the doctrines of sovereign immunity and separation of powers, the Marshal argues

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[2]The Marshal's reliance on General Building Contractors Assn. v. Pennsylvania, 458 U.S. 375 (1982) is misplaced. In that case the Court held

FOOTNOTE CONTINUED ON NEXT PAGE

that the case must be "analyzed in light of general principles of sovereign immunity and separation of powers." Resp. Br. 17. This argument misses the mark.

Certainly, Congress has authorized the Marshal to attend court sessions and transport prisoners. 28 U.S.C. §567, 569. The expenditure of federal money

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FOOTNOTE CONTINUED FROM PREVIOUS PAGE

simply that the All Writs Act did not authorize a district court to allocate to one of the parties a portion of the cost of the remedial decree without specifically finding that the party was liable. This case is clearly distinguishable; the Marshal is not a party to the underlying litigation and it cannot be contended seriously that the trial court must find liability against the Marshal before a writ in the nature of a habeas corpus can be issued against the officer. Furthermore, unlike the situation in General Building Contractors Assn., the writ to the Marshal is not "a remedy" to petitioner or to the original plaintiff; the writ is merely an aid to the process of the exercise of jurisdiction over civil rights actions.

for these general purposes has been approved by Congress. 28 U.S.C. §567. So there is general Congressional approval for activities covered by the order at issue here. The All Writs Act supplies the statutory authority for minor variations in the Marshal's duties. The Marshal's argument that there must be detailed, particular statutory authority for every direction to the Marshal essentially precludes the use of the All Writs Act if the order will have an effect on the federal government. The statute never has been, nor should it be, so narrowly cabined.[3] The better answer, and the

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[3]The Court has approved use of the All Writs Act to impose obligations on federal officials. See United States v. Hayman, 342 U.S. 205 (1952); Adams v. United States ex rel. McCann, supra.

one most consistent with Congressional intent, is that an order otherwise proper under the All Writs Act may call upon federal officials to assist the court.

Moreover, if concepts of sovereign immunity were applicable, the petitioner would be shielded from responsibility for compliance with the order at issue here by the Eleventh Amendment. If, as the Marshal suggests (Resp. Br. 17), the magistrate's order amounts to a judgment compelling the government to act or to expend money from its treasury, surely the Eleventh Amendment would bar the order. Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982); Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 477 (1946).

The better view is, however, that Congress through a variety of measures has sought to ensure that the federal courts have the power creatively and efficiently to manage what now has become almost an overwhelming caseload. By virtue of the habeas corpus statutes, the laws governing the Marshal and the All Writs Act, Congress has authorized the courts to exercise their informed discretion in securing the presence of prisoners to testify in federal proceedings. This conclusion defeats any sovereign immunity or separation of powers claim.

3. The Marshal's hypothesis that petitioner may recover some of its costs in transporting prisoners to court from the parties to the underlying lawsuit reflects at least a partial misconception

of the problems facing state custodians. The burden which custodians face is not solely financial - the diversion of personnel from their normal tasks so that they may transport and remain with prisoners before, during and after their testimony puts a strain of the state's limited personnel resources, a strain which compromises the state custodian's principal concern which is, and must be, maintaining the security of the state prison. Under the circumstances of this case, the Marshal has not alleged any similar burden.

In any event, the Marshal stands on the same footing as petitioner - if we may recover costs from the litigants, so may he. Finally, as the Marshal recognizes (Resp. Br. 41), the ability to recover costs will be of little value in

many cases. It has been petitioner's experience that prisoners most often are called to testify on behalf of indigent parties from whom costs, even if awarded, cannot be recovered. In the final analysis, the Marshal's discussion, while interesting, is irrelevant to resolution of the question presented in this case.

CONCLUSION

For the reasons set forth above and in our main brief, the judgment of the Court of Appeals should be reversed.

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